

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: Marc Lemchen Serial No.: 09/746,947 Filed: Dec. 21, 2000 For: A METHOD AND APPARATUS FOR THE USE OF A NETWORK SYTSTEM FOR BIOFEEDBACK STRESS REDUCTION	
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Appellant's Reply Brief

The reply brief is limited to issues raised in the Examiner's Answer.

(vii) Argument.

Rejection Pursuant to 35 U.S.C. 102(e)

The Examiner's Response to Argument beginning at paragraph (10), page 7, is generally stated without specific reference to an appealed claim, and is preceded by what appears to be a repetition of the office actions, including those stated against claims not on appeal. Claims 1, 13, 25 and 26 are subject to appeal.

A issue which seems to run through the appeal arguments is the meaning attributed by the Examiner to the word "exercise". Exercise as interpreted as physical exercise by the Examiner is one of several dictionary definitions of the word.¹ The

¹ According to Merriam-Webster's Dictionary:

1 a : the act of bringing into play or realizing in action : **USE** <the *exercise* of self-control> b : the discharge of an official function or professional occupation

claims and disclosure clearly refer to a series of mental or emotional attempts to control what is subconsciously controlled. The specification and claims are not directed to inducing physical stress to cause the body to respond by changing or strengthening vascular and muscular systems.

“When the meaning of a term is sufficiently clear in the patent specification, that meaning shall apply. See *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384, 1388, 21 U.S.P.Q.2D (BNA) 1383, 1387 (Fed. Cir. 1992); *Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889, 221 U.S.P.Q. (BNA) 1025, 1031 (Fed. Cir. 1988). This rule of construction recognizes that the inventor may have imparted a special meaning to a term in order to convey a character or property or nuance relevant to the particular invention. Such special meaning, however, must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention.”²

Here the applicant has not served as his own lexicographer in the sense that a meaning has been attached to the word, “exercise”, is one devised by applicant alone, but the applicant has instead used the word, “exercise”, in certain ones of the recognized dictionary meanings of the word to the exclusion of another one of the meanings. The Examiner must construe the claims not in terms of misinterpreted

<exercise of his judicial duties> c : the act or an instance of carrying out the terms of an agreement (as an option) -- often used attributively <an option's exercise price>

2 a : regular or repeated use of a faculty or bodily organ b : *bodily exertion for the sake of developing and maintaining physical fitness* <trying to get more exercise>

3 : something performed or practiced in order to develop, improve, or display a specific capability or skill <arithmetic exercises> <vocal exercises>

4 : a performance or activity having a strongly marked secondary or ulterior aspect <party politics has always been an exercise in compromise -- H. S. Ashmore>

5 a : a maneuver, operation, or drill carried out for training and discipline <naval exercises> b *plural* : a program including speeches, announcements of awards and honors, and various traditional practices of secular or religious character <commencement exercises>

² *Multiform Desiccants, Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477 (Fed. Cir. 1998).

meanings, but in terms of the clear meaning used in the specification, and examine the claims consistent with the proper meaning of the claim terms. To do otherwise would allow distortion of the specification and claims in a context, which effectively intentionally misconstrues the disclosure.

1. *Inherently Reduce Stress Levels*

The first point stated presumably directed to all the claims on appeal by the Examiner in the Response to Argument is that exercise will inherently reduce stress levels of the user, have no effect on stress levels or will increase stress levels depending on the level of exercise. It is important to emphasize here that in Pyles “exercise” means physical exercise on a treadmill or the like. In the claimed invention “exercise” means mental or emotive exercise. The user is sitting in front of a computer and is making little if any overt physical movement. In the claims on appeal the person who uses the invention is not referred to as an exerciser, but as a user.

Because Pyles monitors heart rate and allows the user to set new goals or provide health information to the user, the Examiner concludes that “exercise” reduces stress levels. Pyles in fact never refers to “stress” or “emotion” and has virtually no substantive disclosure relating to any mental aspect of the user. There may be confusion of terms in the Examiner’s statement between emotional/mental stress and physiological stress, but giving the benefit of the doubt to the Examiner, the stated conclusion based on alleged inherency of emotional/mental stress reduction does not follow from the Examiner’s premises.

2. *Inputting of Health Information*

As a second point at page 8, first full paragraph, the Examiner equates the inputting of health information with the inputting of personal stress factors³. Personal factors which create stress for a user, such as occupational, marital or family stress at the moment, e.g. an expected confrontational meeting to be held at the office within the next 30 minutes, would not in any fair sense of the word be considered “health information” nor find they way into any health information database or health information taken from a patient prior to any medical treatment. The context of the invention is the use of biofeedback to affect immediate emotional or mental stress conditions and not to diagnose or treat any acute or chronic physical or pathological mental disease state. The user’s immediate emotional state is not a datum of a health record.

3. *A Modifiable Schedule to Reduce Stress Levels*

As a third point at page 9, first paragraph, with respect to each of the claims on appeal the Examiner focuses on a modifiable schedule to reduce stress levels. What schedule is being modified in the claimed invention are mental or emotional uses of the computer and not physical “workouts” on treadmills or other types of physical exercise machines. The only commonality with Pyles is that something is being rescheduled or modified. The claim element is defined by what is being acted upon or what act is performed, i.e. a rescheduled or modified programmable computer or the step of generating a modified schedule and the results to be attained by such rescheduling or modification and not by the mere act of rescheduling devoid of any further context.

The rescheduling of the physical workout routine in Pyles is contended by the Examiner as inherently resulting in stress reduction, but this inherency is based on an a contested and unproved initial assumption of the Examiner concerning programmed physical exercise and mental/emotional stress reduction, which does not logically or inherently follow. Even to the extent that such an inherent result might in some cases follow in some exercisers at some level of physical exercise, the claimed invention requires only mental/emotional exercises through a computer and not physical exercises on some kind of exercise machine.

As the Examiner further admits, depending on the level of physical exercise the physiological stress could increase, remain the same or decrease. For example, in cardiovascular exercises a physical workout routine would be just as likely to be rescheduled or modified to increase physical cardiovascular stress levels which might actually increase of emotional stress as well depending on the emotional disposition of the user. Pyles is in fact silent with respect to emotional stress levels that might result from the exercise. The undersigned, having taken several cardiovascular stress-test exercises on a treadmill in a medical office can personally testify to the fact that such exercises are very mentally/emotionally stressful and not in any sense relaxing.

In claim 1 for example, the schedule is modifiable to reduce stress according to:

- the compliance of the user with the schedule,
- the performance of the user in the stress reduction exercises,
- situational events to which the user is subjected,
- biofeedback from the user during performance of the stress reduction exercises

³ In claim 13, "automatically inputting personal stress factors relating to a user from

or at times other than during the performance of the stress reduction exercises,

- information input into the computer by the user relating to personalized stress characteristics of the user, and/or
- information input into the computer by the user relating to personalized stress related history of the user.

The limitations on the type of modifiable element or the step of modifying the schedule to reduce mental/emotional stress is not disclosed in Pyles. This is a limitation in claim 1 and is not only in the specification. Similar statements can be made with respect to each of the appealed claims. To the contrary the cited paragraph [010] of Pyles states that workout resistance and times are changed to meet physical fitness goals:

The user can upload and display all pertinent exercise information, including workout history, goals, fitness programs, and even the weather and other sports related information for outdoor workouts. The web link and computers can generate control signals that adjust the **fitness** device to increase or decrease resistance and workout times to maintain a user's heart rate and exercise regimen. **Goals for fitness** can be input by the user through an operator interface, and the web site or computer will track progress, set new goals, or provide health information for the user. (emphasis added)

A physically fit person may be under great mental/emotional stress or under little mental/emotional stress. Physical fitness is unrelated to mental/emotional stress of the user of the claimed computer and computerized method.

sensors through a user's client computer coupled to the computer network".

4. Interactively by Use of a Computer

As a fourth point at page 9, second paragraph, with respect to all of the appealed claims the Examiner focuses on the phrase “interactively by use of a computer.” Claim 1 for example calls for “stress reduction exercises are to be performed by the user interactively through use of the computer.” The Examiner discusses two-way communication between the user and the computer. Pyles describes at paragraph [029] a feedback loop by which physical exercise input into the exercise machine by the user is controlled to keep heart rate within a selected range. Again the issue is whether control of physical exercise is the same as control of mental/emotional stress states. They are not identical and are of a fundamentally different nature both as to what is sensed and the range of the sensed magnitudes even in a commonly used physiological response like heart rate, and more particularly in how the sensed signal is interpreted to indicate increasing or decreasing mental or emotional stress. Cardiovascular fitness level indicators are as different from cardiovascular indicators of mental or emotional stress as screaming is from softly humming in a voice signal. The claimed invention and Pyles are not looking at heart rate in the same way, in the same ranges or for the same meanings. The commonality that the heart is involved in different ways in different aspects of human physical and mental existence does not make anything and everything relating to the heart as identical for all possible purposes. Moreover there are other more different mental or emotional stress indicators such as nervous sweating, galvanic skin response, endocrine markers, microcontractions in facial muscle and the like which are irrelevant as physical exercise indicators.

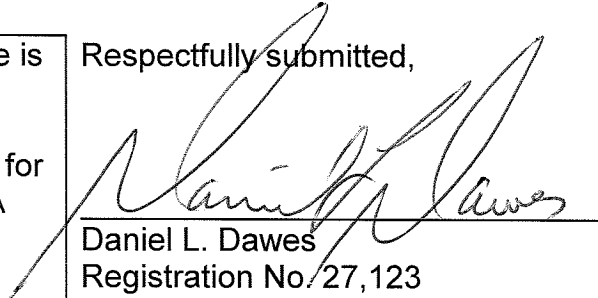
Applicant respectfully requests direction to the Examiner to find novelty of the claims over Pyles under section 102e.

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on August 28, 2007 by

Signature

August 28, 2007

Respectfully submitted,



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